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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 471.
In Bankruptcy.

BANKERS TRUST COMPANY et al.,
Appellants,
vs.
RECONSTRUCTION FINANCE CORPORATION, L. W. BALDWIN and GUY A. THOMPSON, Trustees of MISSOURI PACIFIC RAILROAD COMPANY, UNITED STATES OF AMERICA et al.,
Appellees.

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BANKERS TRUST COMPANY et al.,
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Appellees.

On Certiorari from the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

BRIEF

OF TRUSTEES OF THE MISSOURI PACIFIC RAILROAD COMPANY UPON THE VALIDITY OF THE GOLD CLAUSE IN THE BONDS AND MORTGAGE OF THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, RIVER AND GULF DIVISIONS.

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STATEMENT.

Trustees for the Debtor adopt the Statement and Brief filed by the United States Government and the Reconstruc-

tion Finance Corporation and, in addition thereto, because of the large, financial interest of the Trustees of the Debtor in the issue involved in this case, said Trustees submit the following separate Statement and Brief:

The issue in this case is between the Bankers Trust Company, as trustee of the St. Louis, Iron Mountain & Southern Railway Company, River and Gulf Divisions, first mortgage, and the trustees of the Missouri Pacific Railroad Company, Debtor, over the validity of the gold clause in the bonds which said mortgage was given to secure.

The controversy, as originally presented to the United States District Court administering the bankruptcy proceedings of said Missouri Pacific Railroad Company, Debtor, was thus a dispute between private parties, borrower and lender, over the amount due upon written bonds and a mortgage contract.

The meaning, purpose and intent of the language in the bonds is unambiguous.

In answer to the petition of the Bankers Trust Company, setting up the validity of the gold clause of said bonds and mortgage, the trustees of the Debtor and its creditors, including the United States Government and the Reconstruction Finance Corporation, set up that the gold clause of said bonds and mortgage was illegal because in conflict with the resolution of Congress embodied in Public Resolution 10, now Clause 463, Title 31, U. S. C., passed by Congress on June 5, 1933.

The mortgage in question contained the provision that

the bonds secured thereby, in the sum of $34,548,000.00, which are now outstanding, would be paid in gold coin of the United States of the standard of weight and fineness prevailing on May 1, 1903, the date of the execution and delivery of said mortgage (Tr. Rec., pp. 54-58).

Said Section 463 of Public Resolution 10, above referred to, provides as follows:

> "Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular amount of coin or currency, or in an amount of money measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred.
>
> "Every obligation heretofore or hereafter incurred, whether any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any kind of currency which, at the time of payment, is legal tender for private debts."
>
> Public Resolution 10, now Section 463, Title 31, U. S. C., passed June 5, 1933.

Upon the issue thus presented, Hon. Charles B. Faris, United States District Judge administering the bankruptcy proceedings of said Missouri Pacific Railroad Company, Debtor, in an able and scholarly opinion, on May 24, 1934, upheld the validity of said resolution of Congress and held the gold clause of said bonds and mortgage was void (Tr. Rec., pp. 109-128).

In this opinion, in discussing the disastrous effects to the Debtor, Missouri Pacific Railroad Company, and its trustees if the bonds secured by said mortgage and the other mortgages upon the Debtor's property containing a gold clause should be paid in gold, the Court said:

> "Can it be doubted that if the Debtor here shall be compelled to pay $743,000,000 upon its mortgage indebtedness instead of $438,000,000, it will be utterly bankrupted and financially destroyed; that its general creditors and stockholders will get nothing, and even its bondholders will be paid only part of their inflated debt?" (Tr. Rec., p. 113.)

As stated by the Court, if the gold clause of the bonds in question is enforceable in law in this mortgage and others of the Debtor which contain such gold clause, instead of its funded debt being $438,000,000, said funded debt would total the enormous sum of $743,000,000.

It will thus be seen that the issue presented is a most important one, not only in this bankruptcy proceeding, because of the fact that the Debtor's mortgages, containing similar gold clauses, in the event that same are valid, would result in an increase of its bonded debt from $438,000,000 to $743,000,000, but also because the issue is squarely presented of the power of the Government, under the Constitution, to enact the joint resolution of June 5, 1933, fixing the monetary standard in the United States.

BRIEF.

I.

The Joint Resolution of Congress of June 5, 1933, Was a Valid Exercise of the Government's Legislative Power Under Section 8, Article I of the Constitution.

Section 8, Article I of the Constitution, expressly delegates to Congress the power "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." And the same section contains the broad delegation of power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers, vested by this Constitution in the Government of the United States, or in any department or officer thereof" (Section 8, Article I, Constitution of the United States).

In the Resolution of June 5th, Congress provided that:

> "Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, **or in an amount in money of the United States measured thereby**, is declared to be against public policy. * * * Every obligation heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

Construing the fifth clause of section 8 of the Constitution, the Supreme Court, in the Legal Tender cases, speaking through Mr. Justice Strong, said:

> "If it be held by this Court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every individual sovereign other than the United States), the Government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. * * * A decent respect for a co-ordinate branch of the Government demands that the judiciary should assume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution. * * * No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments of the paramount object, which was to es-

tablish a government, sovereign within its sphere of capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy. * * * We do not propose to dilate at length upon the circumstances in which the country was placed when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging, which seriously threatened the overthrow of the Government and the destruction of the Constitution itself. * * * It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the Government created by the Constitution. * * * Concluding, then, that the provision which made treasury notes a legal tender for the payment of all debts other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the Government, we proceed to inquire whether it was forbidden by the letter or spirit of the Constitution. It is not claimed that any expressed prohibition exists, but it is insisted that the spirit of the Constitution was violated by the enactment. * * * They claim that the clause which conferred upon Congress power 'to coin money, regulate the value thereof, and of foreign coin,' contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals, can ever be declared by law to be money or to have the uses of money. * * * We do not, however, rest our assertion of the power of Congress to enact legal tender laws upon this grant. We assert only that the grant can, in

no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are a complete power over the currency, rather than restraining. * * * Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. * * * If, then, the legal tender acts were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law."

12 Wallace, 79 U. S. 459, 548-549.

Thus was this historic controversy over the legal tender issue decided by this Court following the Civil War.

In Smith v. Kansas City Title & Trust Co. (255 U. S. 180), where the provisions of the Federal Farm Loan Act of July 17, 1916, were before the Supreme Court for interpretation, the Court held, in the opinion of Mr. Justice Day, that under the fifth clause of section 8, article I, Congress had the exclusive power "to coin money, regulate the value thereof," etc. In the course of the opinion the Court said:

"Congress, it was held, had authority to use such means as were deemed appropriate to exercise the great powers of the Government by virtue of Article I, Section 8, Clause 18 of the Constitution, granting to Congress the right to make all laws necessary and proper to make the grant effectual. * * * But, it is urged, the attempt to create these federal agencies and to make these banks fiscal agents and public depositories of the Government is but a pretext. But nothing is better settled by the decisions of this Court than that when Congress acts within the limits of its constitutional authority it is not the province of the judicial branch of the Government to question its motives."

255 U. S. 180.

This Clause 5 of Section 8, Article I of the Constitution was before the District Court at St. Louis in the recent case of Kercheval v. Ross, No. 10,633, wherein the Court handed down an opinion February 24, 1934, involving the validity of the Missouri statute, which attempted to impair the obligation of a contract payable in gold. The defendants contended that the statute was valid, under Knox v. Lee and Parker v. Davis (12 Wallace 457), known as the legal tender cases. The District Court—Judge Faris—distinguished between the power of Congress and the power of the Missouri Legislature in this language:

"Let us look a moment to these differences in sovereign functions and organic law:

"Disassociated from international exigencies, or,

more accurately, from the necessities of commerce between nations, and inhibitions, if any, found in the organic law, every sovereignty has the inherent power to decree anything to be money or a medium of exchange which it may desire; as witness the iron coins of Sparta and, among uncivilized tribes, the wampum belts of the American Indians and the grindstones of the islands of the Southern Seas, and other historical instances of the use as money of practically worthless substances, which are too numerous to mention.

"It will be observed that the Federal Constitution nowhere categorically limits money to gold and silver, or even to metallic substances. It does say that 'the Congress shall have power * * * to coin money (and) regulate the value thereof.' If it be argued that the Congress, by the use of the transitive verb 'coin' in the language quoted, intended that the money of the United States should be limited only to such metals as are capable of being coined or minted, this argument is met by the decision of the Supreme Court of the United States in Knox v. Lee and Parker v. Davis, 12 Wall. 457, the so-called legal tender cases. But such an argument is also met by the very language which concludes the sentence quoted; for, obviously, if the Congress has power to regulate the value of the coined or minted money of the United States, it may, so far as the Constitution is concerned, fix its value, or its so-called previous metal content, so low that, when judged by the standards of other nations, its value will be less than that of the paper on which so-called fiat money is printed.

"There is no express constitutional inhibition anywhere to be found which forbids the Congress from passing an act which violates the obligation of a pre-

existing contract. Not only will the Federal Constitution be read in vain to find such a provision, but the Supreme Court of the United States has repeatedly so ruled (Hepburn v. Griswold, 8 Wall., l. c. 623; Mitchell v. Clark, 110 U. S., l. c. 643; Legal Tender Cases, 12 Wall. 457; New York v. United States, 257 U. S., l. c. 601). If occasionally the Supreme Court has seemed to find such inhibition, it has deduced it from the so-called spirit of the Constitution (see Hepburn case, supra), or it has allocated it (many times, no doubt, correctly) among the numerous offspring of that fertile and elastic provision touching 'due process of law,' found in the Fifth Amendment. It is not, I repeat, to be found in any of the language of either the Constitution or of the several amendments thereto.

"I have never been able to see wherein the unhampered exercise by the Congress of the power to declare what shall be the medium of exchange at all impinges upon 'due process of law' when the constituent elements of that term are considered (Duncan v. Missouri, 152 U. S., l. c. 382; State v. Guerringer, 265 Mo. 409). For there is the very highest judicial authority for the statement that

> " 'whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated' (Legal Tender Cases, 12 Wall., l. c. 545).

"Being in Congress, this power cannot be in any state, because of the paramountcy of federal statutes and of the Federal Constitution, for the Federal Constitution expressly takes the power from the states 'to emit bills of credit (or) make anything but gold

and silver coin a tender in payment of debts' (Article I, Section 10, United States Constitution). The express power granted to the Congress 'to coin money (and) to regulate the value thereof' was necessary only in an historical sense and for the sake of clarity; this, for the reason that each of the original thirteen sovereign states had, in virtue of their sovereignties, the inherent right to say what should be the medium of exchange, or money, within their several jurisdictions. But for this fact and the further fact that a voluntary union of independent states to form a single sovereign entity was then unique and unusual in this world, it would not have been necessary to confer express power on the Congress to deal with money. But the states each had this power, and it was deemed wise to take it from them. Therefore, induced, evidently, by the settled theory that the Federal Constitution is a grant and not a limitation of power, it was deemed wise to express the power, and this was done. But, I repeat, this was not necessary. The United States having, in effect, taken the power from the states, would have inherited it and possessed it, by virtue of its own sovereignty, even if it had not been mentioned in the organic law."

* * * * * * *

"So I am of opinion that the United States has, through the Congress, the constitutional power to prescribe by statute what is legal tender for the payment of both public and private debts, either subsequent or antecedent in their accrual to the passage of the law. In fact, this identical thing has been done; it has passed laws, held to be valid, wherein, both directly and by indirection, pre-existing contracts were

violated. Moreover, by the Act of June 5, 1933, it did in principle what is tantamount thereto; that is to say, by the act last above referred to, it decreased the gold content of the gold coins of the United States, which, of course, indirectly, if not directly, impaired the obligations of existing contracts.

"In the absence of any provision in the Federal Constitution forbidding the passage of a statute which violates the obligation of a contract, and in the light of the ruling of the Supreme Court in the Legal Tender Cases, supra, it seems impossible to escape the conclusion that the Congress possesses the power to say what shall be the medium of exchange, even though the exercise of the power may indirectly result in the impairment of the obligation of existing contracts. But it does not follow that a state of the Union may do the like, or that it has any such power. This, for the reasons that not only does Section 10, Article I of the Constitution of the United States, forbid a state from passing any law impairing the obligation of a contract, but the Constitution of Missouri itself forbids such a law (Section 15, Article II, Constitution of Missouri 1875).

"Even, perhaps, if this were not so as a matter of law, it would become so as a matter of fact, because of the limited amount of gold and the almost unlimited sum of obligations promised to be paid in gold. I do not lose sight, of course, of the well-known economic fact that, due to normal circulation, a billion dollars in gold may serve to pay several billion dollars of gold obligations, if the gold is moving freely."

It may be contended that the Court's remarks in this important case were obiter, since the issue involved was the constitutionality of the state statute, and not an act of Congress, but in view of the contention of the defendants, the Court, as the above-quoted language will indicate, construed the power of Congress under the Fifth Clause of Section 8, Art. I of the Constitution of the United States.

Counsel for the Trust Company contend that the parties to the contract "meant by the gold clause that the Railroad Company should assume the risk of the depreciation of the currency before the bonds were paid, and the gold clause was intended as a measure of the value of the bonds," etc., and that the parties to this contract "thereby adopted the gold clause as a means by which the amount of their indebtedness was to be measured and ascertained, if there should be a depreciation of the currency before they were paid."

If the joint resolution approved by Congress on June 5, 1933, is a valid exercise of power by the Congress, then this argument falls, because it could be applied as to every obligation which is stricken down by the congressional resolution. Congress provided that:

> "**Every obligation, heretofore or hereafter incurred,** whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

The Joint Resolution of Congress of June 5, 1933, expressly providing that such gold clauses as the Debtors' bonds in this case contain should be "discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts," and this Resolution being within the constitutional power of Congress under Section 8, Article I of the Constitution, said Gold Clause is and should be adjudged void by this Court.

II.

The Resolution of June 5, 1933, Was Within the Power of Congress Under the General Welfare Clause of the Constitution.

The preamble of the Constitution of the United States shows that the Constitution was originally framed to "promote the general welfare" of the people of the United States, and section 8, article I, expressly delegates to Congress the power "to * * * provide for the common defense and **general welfare of the United States.**"

In Massachusetts v. Mellon, 262 U. S. 448, the constitutionality of the "Maternity Act" of November 23, 1921 (42 Stat. 224), was questioned by the Commonwealth of Massachusetts. Mr. Justice Sutherland decided the case and in upholding the act of Congress the Court said:

> "The functions of government under our system are apportioned. To the legislative department has been

committed the duty of making laws; to the executive department the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct or restrain the action of the other."

Alexander Hamilton construed the General Welfare Clause as authorizing Congress to make appropriations for any public purpose connected with the general welfare of the United States. He expressly stated this doctrine in his report to manufacturers in 1791 (Storey, Constitution, 5th Ed., 978). This view was adopted and followed by Storey (Storey, Constitution, 5th Ed., Secs. 975, 992). Certainly there was need for the exercise by Congress of power following the late World War to provide in no uncertain way for the "general welfare" of the people of the United States.

Bankruptcies in all kinds of business existed in every state of the Union, state and municipal governments became insolvent, there was dire distress among the agricultural classes of the country, and it was estimated that between twelve and fifteen million people were out of employment. Legislation that Congress has adopted, such as the amendment of the Bankruptcy Act to provide for the reorganization of the capital structure of railroads, the National Industrial Recovery Act, under which the Government has virtually established a governmental super-

vision of private business to encourage employment and help relieve the widespread distress of its citizens; the Railroad Emergency Act, the Public Works Act and the relief for agriculturists, along with the resolution of June 5th, setting aside such obligations as we find in this mortgage, were all necessary and were constitutional enactments under the General Welfare Clause of the Constitution.

See Heisler v. Colliery Co., 260 U. S. 245.

But counsel for the Trust Company say, regarding the resolution of Congress:

> "From this preamble it is clear that the resolution does not even purport to be an emergency measure. * * * But, even if the resolution purported to be an emergency measure, the emergency does not create power."

In view of the conditions existing following the World War, it cannot be doubted, according to the historical facts of which the Court will take judicial notice, that a grave emergency confronted the National Government. Of course, "an emergency does not create power." The Constitution in our Government creates the power, but the emergency is the occasion for the exercise of the power, and it certainly cannot be doubted that there was sufficient emergency to justify the exercise of the power of Congress in the enactment of the resolution of June 5, 1933.

Under the General Welfare Clause of the Constitution, Congress has a large discretion as to the means to be employed in the exercise of any power granted to it.

> Northern Securities Co. v. United States, 193 U. S. 343;
> Fairbank v. United States, 181 U. S. 287.

Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of the objects within the scope of the powers granted to it. The test of the power of Congress is not necessarily the judgment of the courts that a particular means was the best that could have been employed to effect the end contemplated by the National Legislature.

The power of the judiciary is limited to inquiring into whether or not the means exercised by Congress in the execution of a granted power were forbidden by the organic law. If within the Constitution, the act of the legislative branch of government is exclusive.

> Interstate Commerce Commission v. Brimson, 154 U. S., l. c. 473.

In other words, under the general grant of power, in Article One, Section Eight of the Constitution, Congress may use any means appearing to it most eligible and appropriate which are adapted to the end to be accomplished and which are consistent with the letter and spirit of the Constitution.

> Logan v. United States, 144 U. S. 282.

This necessarily follows from the very nature of the duties to be performed by the three separate departments of Government.

The courts cannot legislate, nor can the executive department of the Government alone act in a national emergency, such as existed in this country following the World War. Legislation was necessary to preserve the very existence of the Government and its free institutions.

The General Welfare Clause of the Constitution left the Congress a broad discretion as to the means to be employed in such emergency. The performance of the high duties assigned to Congress in the manner most beneficial to the people vested a discretion as to the necessary and proper execution of its power in Congress.

Legal Tender Cases, 12 Wall. 538.

If the end be legitimate and within the scope of the Constitution, all means which are appropriate and adapted to that end and which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

McCulloch v. State of Maryland, 4 Wheat. 316.

In interpreting the Constitution, every word must have due force and appropriate meaning, since it is evident from the whole instrument that no word was unnecessarily used or needlessly added.

Holmes v. Jennison, 14 Peters 540;

Ogden v. Saunders, 12 Wheat. 213;
Cohens v. Virginia, 6 Wheat. 264;
Meyers v. United States, 272 U. S. 52.

This rule of interpretation would apply as well to the language used in the Preamble to the Constitution, to **"promote the general welfare and secure the blessings of liberty,"** as to other articles and sections of the Constitution, as this Court has squarely held that the Preamble is a necessary source of substantive power, consistent with the other specially delegated powers contained in the different articles and sections of the Constitution.

Dorr v. United States, 195 U. S. 140;
Jacobson v. Massachusetts, 197 U. S. 11-22;
Sturgis v. Crowninshield, 4 Wheat. 122-202;
1 Story's Constitution 462.

And, where the declared object of the Constitution, as set forth in the Preamble, is to

"Promote the general welfare,"

and, by section eight of article one, this broad grant of power,

"To * * * provide for the common defense and **general welfare** of the United States,"

is expressly delegated to Congress, for stronger reasons, this repetition of the object of the Constitution, coupled with the express grant of general powers,

"To * * * provide for * * * the **general welfare** of the United States,"

should be held to include all means adopted by Congress to attain the ends in view which are not expressly prohibited by the Constitution. Accordingly, this grant of power to Congress has been held to include the federal operation of railroads,

Northern Pacific v. State of North Dakota, 250 U. S. 135;

to provide an Emergency Fleet Corporation,

United States v. Walter, 263 U. S. 18;

to provide for federal food control,

United States v. Cohen Grocer Co., 255 U. S. 81,

and other incidental powers necessary **"to promote the general welfare."**

See, also,

U. S. Grain Corporation v. Phillips, 261 U. S. 106.

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

McCulloch v. Maryland, 4 Wheat. 316, 421.

III.

In This Bankruptcy Proceeding the Court Possessed the Power, Under the Constitution, to Impair the Existing Obligations of Contracts.

The Constitution of the United States (Section Eight, Article One) vests in Congress the power to adopt "uniform laws on the subject of bankrupteies throughout the United States." This grant of power has been held to include the distribution of the property of the Debtor among his creditors and his discharge from all contracts and legal liabilities.

Pope v. Title Guaranty Co., 152 Wisc. 611, 140 N. W. Rep. 348.

This grant has been held to vest in Congress a plenary power over the subject of bankrupteies. One of the incidents of the power granted is the right of the Debtor, under the decision of the Administrative Judge, to be discharged from his contracts and legal liabilities, as well as the intermediate and incidental matters tending to the accomplishment, or the promotion, of these two principal ends.

The only limitation upon the power granted to Congress is that its bankruptcy laws "**shall be uniform throughout the United States.**"

Silverman's Cases, 22 Fed. Cas. 12,855, 2 Abb. U. S. 243-247, 1 Sawyer 410;

Mitchell v. Great Works Milling Co., 17 Fed. Cas. 9662, 2 Story 648.

See, also:

Leidigh Carriage Co. v. Stengel et al., 95 Fed. 637-646, 37 C. C. A. 210.

Indeed, the primary purpose of the bankruptcy laws is to secure an equal and speedy distribution of the property of the bankrupt among his creditors, and all bankruptcy acts have, as an ultimate object, the relieving of the Debtor of his debts, to enable him to have a fresh start in business life.

In re Swofford Bros. Dry Goods Co., 180 Fed. 549;
Pirie v. Chicago Title Co., 182 U. S. 438.

One of the primary functions of the administrative judge in a bankruptcy case is the determination of the validity and amount of the liens against the bankrupt's property.

"Where property, subject to a lien, is in the custody of a court of bankruptcy and the legal title thereto is held by the trustee in bankruptcy, such court has jurisdiction to hear and to determine the question as to the validity and amount of the lien."

7 Corpus Juris, Sec. 307, p. 203;
In re Kligerman, 219 Fed. 758;
In re National Boat & Engine Co., 216 Fed. 208.

The trustees appointed by the bankruptcy court are administering the property of the Missouri Pacific Railroad Company under the Railroad Amendment to the Bankruptcy Act (Section 77, Chapter Eight of said act), approved March 3, 1933; hence the right of the Court to impair the obligation of the gold clause of the bonds in controversy is to be determined by the rules obtaining in bankruptcy courts.

In the case of

In re Franklin Brewing Co., 249 Fed. 334,

Circuit Judge Hough, for the Court of Appeals of the Second Circuit, held that

> "Congress, in the exercise of its constitutional power to establish systems of bankruptcy, may, and indeed always does, impair the obligation of the contracts."
>
> In re Franklin Brewing Co., 249 Fed. 335.

This Court approved the same doctrine in

Mitchell v. Clark, 110 U. S. 643;
Canada Ry. Co. v. Gebhard, 109 U. S. 530.

See, also,

Van Huffel v. Harkelrode, 284 U. S. 224,

where this Court, in an opinion by Mr. Justice Brandeis, held that

"Bankruptcy courts have power to order the property of a bankrupt's estate shall be sold free from liens * * * and that such liens shall be transferred to the trustees."

In the **Van Huffel** case the following occurred in the course of the opinion of the Court:

"The present Bankruptcy Act (July 1, 1898, 30 Stat. at L. 544, chap. 541, U. S. C., title 11, paragraph 1), unlike the Act of 1867, contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances. We think it clear that the power was granted by implication. Like power had long been exercised by federal courts sitting in equity when ordering sales by receivers or on foreclosure (First Nat. Bank v. Sheld, 121 U. S. 74, 87, 30 L. Ed. 877, 882, 7 S. Ct. 807; Mellen v. Miline Malleable Iron Works, 131 U. S. 352, 367, 33 L. Ed. 178, 183, 9 S. Ct. 781). The lower federal courts have consistently held that the bankruptcy court possesses the power, stating that it must be implied from the general equity powers of the court and the duty imposed by Section 2 of the Bankruptcy Act to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto.

"No good reason is suggested why liens for state taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the court express authority to determine 'the amount or legality' of any tax.

"To transfer the lien from the property to the pro-

ceeds of its sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional. Realization upon the lien created by the state law must yield to the requirements of bankruptcy administration. Compare International Shoe Co. v. Pinkus, 278 U. S. 261, 73 L. Ed. 318, 49 S. Ct. 108; Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 75 L. Ed. 645, 51 S. Ct. 270; Straton v. New, 283 U. S. 318, 75 L. Ed. 1060, 51 S. Ct. 465. In many of the cases in the lower federal courts the order of sale entered was broad enough to authorize a sale free from tax liens as well as from others; and in some of them it appears affirmatively that liens for taxes were treated as discharged by the order. No case has been found in which the power to sell free from the lien of state taxes was denied."

Van Huffel v. Harkelrode, 284 U. S. 227, 228 and 229.

In

Canada Southern Ry. Co. v. Gebhard, 109 U. S. 528,

the holders of mortgage bonds of the Canada Southern Railway Company had exchanged underlying bonds for a new bond issue under the Canada Arrangement Act of 1878, and the holders of a minority of these bonds objected to the arrangement under which their bonds were to be substituted for the new bond issue. This Court, in the opinion by Mr. Chief Justice Waite, held:

"As individual holders of mortgage bonds issued by a railroad corporation, and secured by the same mortgage, have mutual contract interests and rela-

tions, there is nothing inequitable, when the power exists, in subjecting a small minority to the will of a decided majority in reorganizing the mortgage indebtedness when the corporation is embarrassed. Semble, That if this were done by virtue of a statute of the United States, enacted under the provision of the Constitution conferring power to establish uniform laws on the subject of bankruptcy, it would not be regarded as impairing the obligation of a contract."

In the course of the opinion in that case Chief Justice Waite said:

"It is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting states from passing laws impairing the obligations of contracts, allows Congress 'to establish * * * uniform laws on the subject of bankruptcy throughout the United States.' Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances, the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."

Canada Southern Ry. Co. v. Gebhard, 109 U. S. 539.

To the same effect was the opinion of Mr. Justice Miller, for this Court, in

Mitchell v. Clark, 110 U. S. 634,

where the Court said:

> "That a similar statute in regard to suits by or against an assignee in bankruptcy governs the state courts, see **Jenkins v. The Bank**, 106 U. S. 571, and **Jenkins v. Lowenthal**, 110 U. S. 222.
>
> "It is no answer to this to say that it interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this, as it does the states; and where the question of the **power** of Congress arises, as in the legal tender cases, and in bankruptcy cases, it does not depend upon the incidental effect of the power itself."
>
> Mitchell v. Clark, 110 U. S., l. c. 643.

Under the Railroad Amendment to the Bankruptcy Act the Interstate Commerce Commission and the court administering a bankruptcy proceeding are authorized to provide for a plan of reorganization of the capital structure of the Debtor, which will not differentiate between the different classes of secured creditors, and the Act of Congress expressly provides that

> "the confirmation of the plan shall discharge the Debtor from its debts, except as provided in the plan."
>
> Paragraph (h), Sec. 77, Railroad Amendment to the Bankruptcy Act.

The plan for the reorganization of the Debtor railroad's capital structure is to be consistent, not only with the interests of the Debtor and its creditors, but also **"compatible with the public interests."**

> Paragraph (f), Sec. 77, Railroad Amendment to the Bankruptcy Act.

It certainly would not be consistent with the "public interest" to permit some of the Debtor's creditors to recover the equivalent of their debt in gold in the face of the Constitutional Act of Congress, enacted to protect "the public interest" against just such contracts.

See:

> Re American Magnestone Co., 34 Fed. (2d) 681;
> Phoenix Building & Homestead Ass'n v. E. A. Carrere's Sons, 33 Fed. (2d) 563.

It has been uniformly held in the reorganization of railroads in equity receiverships that contracts and equities of creditors and stockholders can be set aside by the Administrative Judge.

In

> Phipps v. C. R. I. & P. Ry. Co., 284 Fed. 945,

the Court decreed a reorganization without a sale and the reorganization plan offered to each unsecured creditor 6 per cent preferred stock of the reorganized company to the

amount of his claim, par for par, and the Court of Appeals, in an opinion by Judge Sanborn, upheld this offer as within the power of the Court of Equity.

It further appears from the decision of Judge Sanborn in

North American Co. v. St. L.-S. F. Ry. Co.,
28 Fed. (2d) 174,

that this offer yielded unsecured creditors but 25 per cent of their claims.

See, also,

St. L.-S. F. Ry. Co. v. McElvane, 253 Fed. 123.

The same thing was done in the reorganization of the Missouri Pacific Railway Company in 1917, first mortgage bondholders of the Railway Company having been given preferred stock in the new company, and this offer was upon complaint of creditors, held to be equitable because the stockholders had been assessed $50.00 per share on their common stock, for which they were given junior bonds.

See

Guaranty Trust Co. v. Mo. Pac. Ry. Co., 238 Fed. 812,
and 284 Fed. 952.

See, also,

Kansas City Terminal Ry. Co. v. Central Union
Trust Co., 28 Fed. (2) 176,

involving reorganization of the Missouri-Kansas-Texas Railway Company; and

Kansas City, Mexico & Orient Ry. Co. v. Trustees,
18 Fed. (2) 765,

involving reorganization of the Kansas City, Mexico & Orient Railway Company.

Indeed, the distinguishing feature between a bankruptcy proceeding and an equity receivership is that, while a Court administering a receivership cannot force a creditor to accept less than the full amount of his debt, the property can be sold, under order of the Court, and the liens of creditors divested, whereas, in a bankruptcy proceeding, the right of the Administrative Judge to compel a creditor to take less than the full amount of his debt is one of the incidents of the power vested in a bankruptcy court, under the Constitution.

In other words, not only under the Monetary Clause of the Constitution, but also under the General Welfare Clause and the Bankruptcy Section of the Constitution the decision of the District Court in this case should be upheld.

IV.

The Inhibition Against the Impairment of Contract Obligations Applies Only to the States and Is Not a Limitation Upon the Power of Congress.

If Congress had the power to adopt this resolution under the Constitution, then it cannot be successfully contended

that the gold clause still must stand in order to prevent the impairment of the obligation of contracts.

In the recent case of New York v. United States, 257 U. S. 592, objection was made by the State of New York that an order increasing rates by the Interstate Commerce Commission would impair the obligation of the charter and contract with the state. Chief Justice Taft delivered the opinion for the Court and, in denying this contention, said:

> "The next objection is that the state has a charter contract with the New York Central Railroad Company by which the latter is bound not to charge more than two cents a mile for passenger carriage between Albany and Buffalo, and that, if the Transportation Act permits the Interstate Commerce Commission by such an order to enable the railroad company to violate its contract, it impairs the obligations of the contract in violation of Section 10, Article I of the Federal Constitution. That section provides that 'no **state** shall * * * pass any * * * law impairing the obligation of contracts,' **and does not in terms restrict Congress or the United States.** But it is said that it deprives New York and her people of property without due process of law. As said in Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 230: 'Anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce' " (citing L. & N. R. R. Co. v. Motley, 219 U. S. 467; New York v. U. S., 257 U. S. 601).

In L. & N. Co. v. Motley, 219 U. S. 467, for a valuable consideration, a contract had been made by the Louisville & Nashville Railroad to issue free transportation to the plaintiff Motley. In 1906, many years after this contract had been executed, Congress passed an act granting to the Interstate Commerce Commission power to regulate commerce between the states by railroad, and interdicted the use of "free transportation." The railroad company refused longer to comply with the contract, and in holding that the same was void after the act of Congress the Supreme Court, in an opinion by Mr. Justice Harlan, said:

> "The Court cannot add an exception based on equitable grounds when Congress forbids to make such an exception. * * * There is no provision excepting special contracts from the operation of the law. * * * The power of Congress over interstate transportation embraces all manner of carriage of that character—whether gratuitous or otherwise—and, in the absence of express exceptions, we think it was the intention of Congress to prevent a departure from the published rates and schedules in any manner whatsoever. * * * We now come to the question whether, assuming that the agreement of 1871 was valid when made, could Congress, by any statute subsequently enacted, make its enforcement by suit impossible? There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is, that the power granted to Congress to regulate commerce among the states and with foreign nations is complete in itself, and is unrestricted ex-

> cept by the limitations upon its authority to be found in the Constitution. * * * Long before the above cases were decided, it was said in Knox v. Lee, 12 Wall. 457, 551, that 'as in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to the defeat of legitimate government authority."
>
> L. & N. v. Motley, 219 U. S. 480, 482.

The recent case of Home B. & L. Assn. v. Blaisdell, 78 Sup. Ct. Rep. 255, recognizes the grave emergency confronting the country to the extent necessary under the reserved police power of the state to justify setting aside contracts inimical to the public interest as applicable to states. In the decision in this case, that involved the validity of the Minnesota Mortgage Moratorium Law, which it was claimed violated Section 10, Article I of the Federal Constitution, the Supreme Court, speaking through Mr. Chief Justice Hughes, said:

> "It does not matter that legislation appropriate to a legitimate end has the result of modifying or abrogating contracts already in effect, as contracts are to be regarded as having been made subject to the future exercise of the constitutional power of the state, and the reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order."

Further on the Court said:

> "The economic interest of the state may justify the exercise of its protective power, notwithstanding interference with existing contracts."

And the Supreme Court in the Blaisdell case expressly decided that:

> "Whether legislation designed to relieve an economic emergency is wise or unwise, as a matter of policy, is a question with which the Court is not concerned."

In the course of the opinion in the Blaisdell case the Chief Justice further said:

> "The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. In Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 S. Ct. 127, riparian owners in South Carolina had made a contract for a clear passage through a creek by the removal of existing obstructions. Later, the Legislature of the state, by virtue of its broad authority to make public improvements, and in order to increase the taxable value of the lowlands which would be drained, authorized the construction of a dam across the creek. The Court sustained the statute upon the ground that the private interests were subservient to the public right. The Court said (id., p. 480): 'It is the settled law of this Court that the interdiction of statutes impairing the

obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as a police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.' * * * It is manifest from this review of our decision that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests have inevitably led to an increased use of the organization of society in order to protect the very basis of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected, and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends. * * * The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals, but for the protection of a basic interest of society."

Hence, since Congress had the power, under the Constitution, to adopt Public Resolution No. 10 of June 5, 1933, it cannot successfully be contended that the gold clause in the Debtor's bonds must stand in order to prevent the impairment of a contract obligation.

V.

Whether Malum in Se or Malum Prohibitum, Any Illegal Contract Can Furnish No Basis for a Legal Remedy.

There is no distinction in law between the contract which contravenes public morals and one which is prohibited by law. In either event, the contract is illegal and there can be no legal remedy for that which is itself illegal.

Re Forsythe, 11 Wall. 484;
Bank of United States v. Owens, 2 Pet. 527;
Thomas v. Richmond, 12 Wall. 349.

In

Sage v. Hampe, 235 U. S. 99,

this Court held that, where a contract was entered into which directly tended to bring about results that the law seeks to prevent, said contract cannot be made the ground of a successful suit, since the courts will not lend their assistance in any way toward carrying out the terms of a contract which is forbidden by law.

Sage v. Hampe, 235 U. S. 99;
McMullen v. Hoffman, 174 U. S. 639.

If the contract has a tendency to endanger the public interests or injuriously affect the public good, then it should never receive the sanction of a court of justice, nor can it be made the foundation for its judgment.

Ritter v. Mutual Life Insurance Co., 169 U. S. 139;
Continental Wall Paper Co. v. Voight Company, 212 U. S. 227.

The Courts recognize no distinction between contracts malum in se and malum prohibitum, and in both classes of such prohibited contracts, since there can be no civil right where there is no legal remedy, there is no legal remedy for that which is itself illegal or in violation of a constitutional statute.

Gibbs v. Gas Co., 130 U. S. 396;
Ewell v. Daggs, 108 U. S. 143.

No contract can be enforced in the courts of the United States where it was made in violation of the laws of the United States or is in contravention of public policy.

Kennett v. Chambers, 14 How. 38.

VI.

Decisions of the Permanent Court of International Justice and of the House of Lords, Relied Upon by the Appellants, Are Not in Point in This Case.

The decisions of the Permanent Court of International Justice involving the validity of the Serbian bonds where

under the law the gold clause of said bonds was not invalid, and the decision of the House of Lords in Great Britain in the case of **Feist**, appellant, involving the construction of a gold clause in bonds issued by a Belgian corporation, are not in point in this case for the reason that in neither of those cases was there involved the validity of an Act of Parliament or of a sovereign government, such as the Act of Congress, which strikes down the gold clause of the contract relied on by the Trustees in this case.

The reasoning of the House of Lords that "the gold clause was the means by which the amount of that indebtedness is to be measured and ascertained" could not be controlling in this case, for the reason that the resolution of Congress makes void any obligation which requires payment "in gold or a particular kind of coin or currency, **or in an amount in money of the United States measured thereby.**"

VII.

Bondholders Are Not Entitled to Recover in Current Funds the Value at the Time of Judgment in Gold Dollars Stipulated for in the Bonds.

That the bondholders of the Debtor's Iron Mountain mortgage are entitled to recover in current funds the value at the time of the judgment of the gold dollars agreed to be paid in the bond would strike down the resolution of Congress of June 5, 1933. If such a resolution was a constitutional exercise of power by Congress, the

bondholders are not entitled to recover the equivalent in current funds of the gold dollars specified for in their bonds. The impossibility of performance since the resolution by the federal legislature is a complete impediment to the recovery by the bondholders in this case of the equivalent of the gold dollars specified in their bonds in current funds. Nor does the fact that they cannot recover result in impairment of the contract, for the reason that the contract was made in view of the legal conditions which Congress might subsequently write into the contract. Speaking of legal prohibitions as preventing performance of contracts, the law is thus stated in Ruling Case Law:

> "One of the conditions implied in a contract is that the promisor shall not be compelled to perform if performance is rendered impossible by an act of the law. The inference is that the parties did not contemplate that damages should be paid for nonperformance in the event that performance was subsequently prohibited by law. The decisions of practically all jurisdictions are to the effect that where a contract, legal in its inception, becomes illegal by subsequent statutory enactment, the contract is wholly terminated as soon as the statute takes effect, even though the time specified for its performance has not yet fully expired, and no action can be maintained by either party for failure to perform the obligations of the contract after the illegality has attached."
>
> 6 R. C. L., Sec. 366, p. 1000.

VIII.

Bronson v. Rodes Distinguished.

The principal case relied upon by counsel for appellants is Bronson v. Rodes (7 Wallace 229), holding that where contracts were made payable in coin, judgment must be entered for coin dollars.

Upon the point now before the Court we do not think it can be successfully denied that Bronson v. Rodes was overruled by the decision of the Supreme Court in the Legal Tender Cases.

Knox v. Lee, 12 Wallace 457.

In **Thompson v. Butler,** 95 U. S. 694 (1877), the Court overruled any inference that might be drawn from the dictum in **Bronson v. Rodes,** supra, that a contract payable in a particular kind of money was "a commodity contract," by saying (at pp. 696-697):

> "One owing a debt may pay it in gold coin or legal tender notes of the United States, as he chooses, unless there is something to the contrary in the obligation out of which the debt arises. A coin dollar is worth no more for the purposes of tender in payment of an ordinary debt than a note dollar. The law has not made the note a standard of value any more than coin. * * * We are aware that in **Bronson v. Rodes,** 7 Wall. 229, it was said that a contract to pay in gold or silver coin 'is, in legal import, nothing else than an agreement to deliver a certain weight of

> standard gold, to be ascertained by a count of coins,' and that 'it is not distinguishable, * * * in principle, from a contract to deliver an equal weight of bullion of equal fineness'; **but, notwithstanding this, it is a contract to pay money, and none the less so because it designates for payment one of the two kinds of money which the law has made a legal tender in discharge of money obligations.''**

As said by the District Court in its opinion in the Kercheval case (decided February 24, 1934):

> "A great majority of the state cases disagreed with the doctrine of Bronson v. Rodes, Missouri among the latter" (citing Henderson v. McPike, 35 Mo. 255; Appel v. Waltman, 38 Mo. 194).

In Maryland v. B. & O. (22 Wallace 105) the state claimed the right to be paid in gold because the language used implied an undertaking to pay in coin. And the Court held that no such contract would be presumed to apply from the language used. The difference between that case and this is that here the contract was expressly made payable in gold, which Congress has since declared to be against public policy.

As said by Judge Faris in his opinion, adjudging the gold clause of these bonds void:

> "The gold clause here vexing is not a promise to pay these bonds in gold as money. It is a promise to pay in gold, not as money, but as a mere commodity;

the bulk whereof, or the quantity of gold to be paid, to be equal to the gold content of one thousand dollars of gold coin of the United States of the standard of weight and fineness as of May 1, 1903. * * * In short, it is a mere agreement of barter, or swapping of commodities.

* * * * * * *

"Can it be doubted that Congress had the right to say to those who had made contracts, the effect of which was to forestall and circumvent the Congress itself that, having usurped a power belonging to the Congress, they must give it back, because the exercise of it by a few willful men would vastly harm this country? * * * It cannot, of course, be doubted that if payment be decreed to be made in the paper money equivalent of gold, the power of the Congress in the premises will be just as effectually thwarted and nullified as if payment in gold were decreed." (Opinion, Judge Faris; Tr. Rec., p. 123.)

As applied to the facts and the law governing this case, this logic is unanswerable.

The cogent reasoning in the opinion of Judge Charles B. Faris, the United States District Judge who decided this case, is the most persuasive argument that can be advanced, and trustees for the Debtor are willing to submit the issue in this court wholly upon Judge Faris' opinion.

In conclusion, there is no distinction in the cases between contracts interdicted because they are morally wrong or malum in se, or prohibited by law. In both cases, the

contracts are void and cannot furnish the basis for a legal cause of action. Certainly the presumption should obtain that, following the closing of all the banks in the country and the general conditions existing on March 4, 1933, Congress was actuated by the best of motives to conserve the interests of the people of the United States. In clear and unmistakable terms Congress has denounced all such contracts, past or future, as those relied upon by the trustees in the Debtor's Iron Mountain mortgage. In this legislation, Congress was proceeding under its exclusive constitutional power, and to conserve "the general welfare" of the people of the United States; therefore the gold clause of the bonds in question is not legally enforcible in the courts of this country.

Respectfully submitted,

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